

# US Lawsuit Against NYC for "False Claims" - Says HRA Wrongly Approved 24-Hour Medicaid Home Care

On August 12, 2011, Selfhelp Community Services, New York Lawyers for the Public Interest, Legal Services-NYC, and Cardozo Bet Tzedek Legal Services led 41 organizations in filing an amicus or "friend of the court" brief supporting the New York City Medicaid Program, run by the Human Resources Administration ["HRA"] which the U.S. Department of Justice has charged with filing "false claims" for its approval of 24-hour personal care services. The **amicus brief, which can be downloaded here**, was filed to support New York City's motion for summary judgment, which seeks dismissal of the federal complaint. The 41 amicus organizations speak for older people and people with disabilities who depend on Medicaid personal care services in order to remain in the community.

- ***Olmstead* Case and the Americans with Disabilities Act.** Since the federal lawsuit only challenges the City's approval of 24-hour care, it is the people with the most severe disabilities who receive the services that the federal government claims were improperly approved. The amicus brief argues that the City did not wrongly approve the 24-hour care services. On the contrary, the *Olmstead* decision of the U.S. Supreme Court held that the Americans with Disabilities Act requires Medicaid programs to provide long-term care services in the "most integrated setting" -- meaning in the community, not in institutions. If the City denied services, as argued by the federal lawsuit, it would have violated *Olmstead*. Because of the availability of 24-hour personal care in NYC, there is less reliance on nursing home care in NYC than in the rest of the state and the rest of the country.
- **Denial of 24-hour care Would have Been Illegal.** The federal government claimed that the City should have denied 24-hour/day personal care in any case where the physician under contract with the Medicaid program to assess client needs, called the "Local Medical Director," believed that the client needed a "higher level of care," meaning nursing home care. The amicus organizations argue that the City could not blindly follow the Local Medical Director, since it must not only comply with *Olmstead* but also with the State's fair hearing decisions, and with state regulations and policy directives. Examples of fair hearing decisions, which are cited in the brief, are posted here.
- **The amicus brief was filed in support of New York City's Motion for Summary Judgment**, filed August 1, 2011, which can be downloaded here. NYC is represented by the law firm of Simpson, Thacher & Bartlett LLP on a *pro bono* basis.
  - ◆ Download the federal government's motion for summary judgment here.
  - ◆ Click here for NYC's memorandum of law in opposition to US motion, filed Aug. 23, 2011
  - ◆ Click here for U.S. memorandum of law in opposition to NYC's motion, filed Aug. 23, 2011

♦ Oral Argument on the Motions is scheduled for Sept. 15, 2011 at 5:00 PM

## **Past history of the False Claims Act lawsuit:**

**January 11, 2011 - Federal Court complaint filed against NYC under False Claims Act.**

**January 14, 2011, Selfhelp Community Services, the Legal Aid Society, New York Lawyers for the Public Interest (NYLPI) and over 75 other organizations served a letter -- posted here -- demanding that the U.S. Attorney for the Southern District in Manhattan withdraw the federal court Complaint filed earlier in the week against New York City. As reported in the New York Times on January 15th,**

"...In a strongly worded letter to Preet Bharara, the United States attorney in Manhattan, the advocates said that the lawsuit directly conflicted with federal policy and with a Supreme Court decision [*Olmstead*] requiring states to try to keep those with disabilities in their homes rather than sending them to institutions.

The letter contended that the lawsuit would have a chilling effect on city government's willingness to authorize personal care in the home to people "who desperately need it."

"New York City should be commended â not penalized â for its successful efforts to further this federal goal," said the letter, which had been signed by representatives of more than 200 disability-rights, legal and community organizations.

**On February 23, 2011, the federal government filed an amended complaint (posted here). The federal lawsuit charges that the City's Medicaid program wrongly approved 24-hour Medicaid personal care services for people who, the suit claims, should have been denied home care and placed in nursing homes, according to the physician under contract with the City to review requests for personal care as "local medical director." That physician brought the lawsuit originally -- his separate complaint was dismissed by the federal court judge, but this is a technicality, and he still stands to win millions if the federal court agrees that "false claims" were submitted to Medicaid.**

**On April 13, 2011, the federal court judge denied NYC's motion to dismiss the "False Claims Act" amended complaint.**

**Summary of Motion to Dismiss..** The City is represented by the law firm of Simpson Thacher & Bartlett LLP. The motion to dismiss, which is posted here with

US Lawsuit Against NYC for "False Claims" - Says HRA Wrongly Approved 24-Hour Medicaid Home Care

its memorandum of law, says the federal government has taken "the shocking position that the City should have turned a blind eye to elderly, infirm New Yorkers that are unable to take care of themselves without assistance." If the City made any technical errors with paperwork, these errors are not fraud. The City was not financially enriched in any way by approving Medicaid home care; since it shares the cost of these services with the federal government and the state, the City is basically charged with defrauding itself. The motion describes the City's challenge in administering a program for tens of thousands of people with challenging physical and mental conditions, governed by a complex web of regulations, court injunctions, and a body of administrative fair hearing decisions that are binding under *stare decisis* rules. The City must also carry out the mandate of *Olmstead* -- which requires that services be provided in the community. The federal lawsuit gives examples of six individuals for whom the City approved home care over the "local medical director's" objection. The motion points out that in one case, the services were ordered by the State after a fair hearing. In a second case, a NYS Supreme Court justice had ordered the City to assess and authorize home care. Four of the other cases were reauthorizations of people previously determined eligible for services, which are governed by strict legal requirements to continue care unless the City can prove the medical or other circumstances have changed -- the lawsuit doesn't even mention these requirements. The motion cites established precedent that False Claims Act lawsuits cannot be based on mere paperwork errors, or on second-guessing medical judgments.

#### **NEXT SCHEDULED:**

- Motions for Summary Judgment will be argued in federal court in Manhattan on September 15, 2011 at 5:00 PM
- If no motion for summary judgment is granted, TRIAL date will likely be in October, 2011.

#### **Press Coverage of lawsuit and advocacy response--**

- Advocates. NYC Fight False Claims Act Lawsuit --Crain's Health Pulse Newsletter (Aug. 17, 2011)
- As New York City Defends Medicaid Approvals, Fear of Suit's Fallout Grows - New York Times (January 12, 2011)
- U.S. Says New York City Overbilled Medicaid - New York Times (January 11, 2011)
- Feds see fraud in NYC health care spending - Crain's New York Business (January 12, 2011)
- Mayor Bloomberg says Medicaid suit will cost the city, but it will prevail - New York Daily News (January 14, 2011)
- NYC Medicaid Fraud? - The Brian Lehrer Show, WNYC Radio (January 19, 2011)
  - ◆ Comments on radio show on It's a Free Country WNYC discussion board
- US Attorney Sues New York City for Medicaid Fraud - PHI National (Jan. 27, 2011)
- NYC seeks to dismiss fed's personal care fraud suit - Crain's New York Business (Feb. 15, 2011)

- City Moves To Dismiss U.S. Attorney's Medicaid Fraud Suit -- City Hall (Feb. 16, 2011)

---

Article ID: 148

Last updated: 27 Aug, 2011

Revision: 2

Medicaid -> Home Care -> US Lawsuit Against NYC for "False Claims" - Says HRA Wrongly Approved 24-Hour Medicaid Home Care

<http://health.wnyc.com/health/entry/148/>